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No. .....

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In the Supreme Court of the United States

OCTOBER TERM

COTTON BELT INSURANCE CO., INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a surety's procedural due process guarantees under the federal Constitution are violated when its bond is forfeited by a federal court and the court gives no notice of the forfeiture.

2. Whether procedural due process guarantees under the federal Constitution may be validly waived by entering a contract written according to the Government's terms where there is great disparity in the bargaining strength of the contracting parties.

3. Whether bail bond contracts entered pursuant to Federal Rule of Criminal Procedure 46 are to be construed according to state or federal law.

4. Whether the language of Federal Rule of Criminal Procedure 46 is unconstitutionally vague.

5. Whether requiring a surety of a bail bond contract to appoint the court's clerk as the surety's agent for service of process violates due process guarantees.

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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Apeals for the Ninth Circuit entered in the proceeding on June 17, 1982.

OPINION BELOW

The opinion of the Court of Appeals, which has not been published, appears in the Appendix hereto. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 17, 1982. This Petition for Writ of Certiorari has been filed within 90 days of that date. This

Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The sole petitioner herein is Cotton Belt Insurance Co., Inc.

STATUTORY PROVISIONS INVOLVED

I. United States Code, Title 18:

Federal Rules of Criminal Procedure, Rule 46:

(e) Forfeiture.

(1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(f) Exoneration. When the condition of the bond his been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

* * * * * * * * *

II. California Penal Code Section 1305:

> (a) If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court is lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes and the undertaking of bail, or the money deposited instead of bail, as the case may be, must thereupon be declared forfeited, and, if the amount of the forfeiture exceeds one hundred dollars ($100), the clerk of the court shall, promptly upon entering the fact of such failure to appear in the minutes, mail notice of the forfeiture to the surety on the bond or depositor of money instead of bond, and shall execute an affidavit of such mailing and place it in the court's file in the case. If the surety is an authorized corporate surety insurer, and if the bond has plainly printed or stamped thereon the address of its principal office in California, such notice shall be mailed to such surety at such address, and mailing to the bail agent or solicitor who posted the bond shall not constitute compliance with this section; the clerk shall at the same time send a copy of such notice to the bail agent or solicitor who posted the bond. If the clerk fails to mail such notice within 30 days after such entry, the surety or depositor shall be released from all obligations under the bond....

STATEMENT OF THE CASE

Petitioner, Cotton Belt Insurance Co., Inc., served as surety for the bail release of federal criminal defendants, Arthur H. Biagas and David Dix. The terms of their bail bond contracts were of the standard form mandated by the federal government, pursuant to Federal Rules of Criminal Procedure, Appendix of Forms, Form 17.

Biagas and Dix breached these bonds by not appearing in the Federal District Court for the Central District of

California when required to appear. The District Court, therefore, ordered forfeiture of the bonds. The Biagas bond was for $4,000.00; Dix's was for $25,000.00.

Three Hundred Forty-Eight (348) days and 273 days after forfeiture of the Dix and Biagas bonds, respectively, the surety first learned of the breaches. The surety's first knowledge of the breaches came from a letter sent by the United States Attorney that demanded payment of the bonds.

The surety moved the District Court to vacate these forfeitures. A hearing for the motion was granted, but the motion was denied without opinion. The surety appealed the District Court's denial to the Ninth Circuit Court of Appeals, which sustained the denial.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Law of California.

   A. California Law Requires State Courts to Notify Bail Bond Sureties of Bond Forfeitures Within the Reasonable Time of 30 Days of Forfeiture. Federal Law Has No Similar Notice Requirement.

   B. Under California Law, Constitutional Rights May Not Be Waived by Entering Adhesion Contracts. Federal Law Permits the Contrary.

II. There Is Conflict Among the Circuits Concerning These Issues.

   A. Some Circuit Courts Apply State Law in Construing Bail Bond Contracts Written Pursuant to Federal Rule of Criminal Procedure 46, While Others Apply Federal Law.

   B. Some Circuit Courts Require Federal Courts to Give Notice to Bail Bond Sureties of Circum-

stances That Increase the Sureties' Risks. Other Circuit Courts Have No Similar Requirement.

III. The Decision Below Involves Important Federal Questions That Have Not Been, But Should Be, Settled by This Court.

A. Due Process Guarantees Under the Federal Constitution Are Directly at Issue in This Case.

B. This Conflict of Law Causes Confusion and Uncertainty.

DISCUSSION OF REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Law of California.

A. CALIFORNIA LAW REQUIRES STATE COURTS TO NOTIFY BAIL BOND SURETIES OF BOND FORFEITURES WITHIN THE REASONABLE TIME OF 30 DAYS OF FORFEITURE. FEDERAL LAW HAS NO SIMILAR NOTICE REQUIREMENT.

California Penal Code § 1305 requires state court clerks to send notice to bail bond sureties whose bonds have been forfeited. This notice must be mailed within 30 days of the forfeiture, otherwise "the surety or depositor shall be released from all obligations under the bond." California Penal Code § 1305(a).

The California Supreme Court, in examining California Penal Code Section 1305, noted:

> "There are sound reasons . . . implicit in the pertinent statutory provisions for holding that a forfeiture of a bail bond, where required, must be timely declared. The law traditionally disfavors forfeitures and statutes imposing them are to be strictly construed. . . . In the instant case the statute purports to afford the surety of an opportunity to escape the harsh results of the forfeiture. When a declaration of forfeiture has been made the clerk of the court must 'promptly . . . mail notice of the forfeiture to the surety.' If such notice is not delivered for a period of 30 days, the surety is to

be 'released from all obligations under the bond.'" *People v. United Bonding Ins. Co.*, 5 Cal.3d 898, 906, 489 P.2d 1385 (1971), quoting Penal Code § 1305.

The court explained the strong public policy behind the statute:

> "If a surety is to be afforded the protections provided by these provisions he must be advised at an early date of the fact of the forfeiture in order that he may institute procedures to locate and compel the appearance of the bailee. Should the surety not have an early opportunity to institute these endeavors the possibility of discharging the forfeiture will be severely prejudiced, and it is manifest that he will suffer such prejudice whether there is an undue delay in advising him after the declaration of a forfeiture or a delay in making the declaration itself." *People v. United Bonding Ins. Co., supra,* 906.

Federal law provides no such protection or guide to reasonableness. Federal Rule of Criminal Procedure 46 is silent regarding any such notice of forfeiture to sureties. Some federal courts, therefore, simply state no notice of forfeiture need be given to sureties. *U.S. v. Marquez,* 564 F.2d 379 (10th Cir. 1977). In these federal courts, sureties are necessarily subject to the prejudice California policy avoids with Penal Code § 1305; sureties will not have an early opportunity to "institute procedures to locate and compel the appearance of the bailee," and "the possibility of discharging the forfeiture will be severely prejudiced. . . ." *People v. United Bonding Ins. Co., supra,* 906.

This conflicts between California policy and the opinions of some federal courts could be avoided by the United States Supreme Court holding, as it did in *International Union v. Hoosier Cardinal Corp.,* 383 U.S. 696, 86 S.Ct.

1107, 16 L.Ed.2d 192 (1966), that silence in a federal statute should not be deemed to mean federal courts are free to make "federal common law" that conflicts with state law. In *International Union v. Hoosier Cardinal Corp., supra,* Section 301 of the Labor Management Relations Act of 1946, 29 U.S.C. § 185, was at issue. The section contained no statute of limitations for bringing an action under the Act. It was argued federal courts should have been able to create their own limitations. The Supreme Court disagreed:

> "That Congress did not provide a uniform limitations provision for Section 301 suits is not an argument for judicially creating one. . . . . [I]t cannot be fairly inferred that when Congess left Section 301 without a uniform time limitation, it did so in the expectation that the courts would invent one. . . ." *International Union v. Hoosier Cardinal Corp., supra,* 703.

B. UNDER CALIFORNIA LAW, CONSTITUTIONAL RIGHTS MAY NOT BE WAIVED BY ENTERING ADHESION CONTRACTS. FEDERAL LAW PERMITS THE CONTRARY.

In *Blair v. Pitchess,* 5 C.3d 258, 486 P.2d 1242 (1971), the California Supreme Court held there could be no valid waiver of constitutional rights under the Fourth Amendment of the federal Constitution by entering an adhesion contract. This doctrine was expanded in *Isbell v. County of Sonoma,* 21 C.3d 61, 577 P.2d 188 (1978), where the California Supreme Court held Fourteenth Amendment due process prohibits a county from enforcing certain confessions of judgment. Enforcing these confessions of judgment would have violated due process guarantees since it is "settled constitutional law that 'in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and a hearing.'" *Isbell v. County of Sonoma, supra,*

68, quoting *Beaudreau v. Superior Court,* 14 C.3d 448, 458, 535 P.2d 713 (1975).

Although the California Supreme Court has held procedural due process requires notice before depriving a person of property by the state enforcing a one-sided agreement it entered, some federal courts impliedly hold contra. They do so by enforcing bail bond agreements against sureties without giving prompt notice of forfeitures, which effectively deprives the sureties of their property interests in the bonds without due process.

II. There Is Conflict Among the Circuits Concerning These Issues.

A. SOME CIRCUIT COURTS APPLY STATE LAW IN CONSTRUING BAIL BOND CONTRACTS WRITTEN PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 46, WHILE OTHERS APPLY FEDERAL LAW.

There is disagreement and uncertainty among the federal circuit courts whether state or federal law is to be used in construing bail bond contracts written pursuant to Federal Rule of Criminal Procedure 46. In *United States v. Martinez,* 613 F.2d 473 (3rd Cir. 1980), the court recognized this conflict:

> "Courts of appeals have disagreed on the question whether federal or state law governs the interpretation of bail bonds filed with federal courts. Those holding that state law applies simply assert in conclusory fashion that a contract should be interpreted according to the law in which it was made." *U.S. v. Martinez, supra,* 476, citing *U.S. v. D'Anna,* 487 F.2d 899 (6th Cir. 1973); *U.S. v. Gonware,* 415 F.2d 82 (9th Cir. 1969); and *Palermo v. U.S.* 61 F.2d 138 (8th Cir. 1932), cert. denied, 288 U.S. 600, 53 S.Ct. 318, 77 L.Ed. 976 (1933).
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> * * * * * * *
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> Other circuits, however, have "held that federal common law should be applied because '[f]ederal regulation of bail provisions in the federal courts is perva-

> sive, . . . Federal bail bonds may have distinctive features not found in state bonds,' and 'federal fiscal interests are affected.'" *U.S. v. Martinez, supra,* 477, citing *U.S. v. Catino,* 562 F.2d 1, 2 (2nd Cir. 1977); and *U.S. v. Miller,* 539 F.2d 445 (5th Cir. 1976).

Some federal courts believe a "bail bond contract must be interpreted in light of the applicable law of the state in which the contract was made." *U.S. v. Wray,* 389 F.Supp. 1186, 1190 (W.D. Missouri, 1975), citing *U.S. v. D'Anna, supra; U.S. v. Gonware, supra; Palermo v. U.S., supra; Swanson v. U.S.,* 224 F.2d 795 (9th Cir. 1955); and *Heine v. U.S.,* 135 F.2d 914 (6th Cir. 1943). Other courts consider such language dictum. *U.S. v. Vera- Estrada,* 577 F.2d 598 (9th Cir. 1978). Whether such language is dictum or a rule of law will remain uncertain until this Court settles the issue.

B. SOME CIRCUIT COURTS REQUIRE FEDERAL CLERKS TO GIVE NOTICE TO BAIL BOND SURETIES OF CIRCUMSTANCES THAT INCREASE THE SURETIES' RISKS. OTHER CIRCUIT COURTS HAVE NO SIMILAR REQUIREMENT.

In *U.S. v. Egan,* 394 F.2d 262 (2nd Cir. 1968), cert. denied sub nom., *Stuyvesant Ins. Co. v. U.S.,* 393 U.S. 838, 89 S.Ct. 116, 21 L.Ed.2d 109 (1968), the court stated:

> "Where the court modifies the terms of a bond on its own motion, the clerk of the court should give reasonable notice of the change to the government, the defendant and the surety in advance of the effective date of the modification in order that the parties may be heard or the surety may take any steps it deems necessary to surrender the defendant to custody." *U.S. v. Egan, supra,* 267.

One circuit court has said this language is dictum since *Egan* "never reached the ticklish legal issue because it up-

held the court's finding that the surety knew of this change." *U.S. v. Robinson,* 453 F.Supp. 1, 3 (S.D.N.Y., 1977). *Robinson* continued, however:

> ". . . this court believes that this circuit has set a minimum duty on the Government to notify the surety when its risk has been significantly increased. . . . *Egan* recognizes that a surety cannot be expected to be constantly in court to monitor the proceedings. . . . *Egan* stands for the notion that the surety must be notified when the Government becomes aware that the risk of flight has increased." *U.S. v. Robinson, supra,* 3.

Despite this "notion," other federal courts say no notice is required even after the principal has absconded and the bail has been forfeited. *U.S. v. Caro,* 56 F.R.D. 16 (S.D. Fla., 1972); and *US. v. Vera-Estrada, supra.* The federal circuits are, therefore, in direct conflict: some require notice to a surety whenever the "risk of flight has increased." Others hold no notice is required even after the principal has failed to appear—a time when the "risk of flight" is greatest.

III. The Decision Below Involves Important Federal Questions That Have Not Been, but Should Be, Settled by This Court.

A. DUE PROCESS GUARANTEES UNDER THE FEDERAL CONSTITUTION ARE DIRECTLY AT ISSUE IN THIS CASE.

> "Ingrained in our concept of due process is the requirement of notice. . . . Notice is required before property interests are disturbed. . . . Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Lambert v. California,* 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957)

Whenever a surety enters a bail bond contract with the federal government pursuant to Federal Rule of Criminal

Procedure 46, the surety faces the possibility of having its property interests in the bond forfeited without any assurance of having its constitutional rights to procedural due process protected. The lack of a uniform notice requirement, as discussed above, contributes to this problem; so too does the federal government's willingness to enforce these one-sided contracts without also giving prompt notice of forfeitures.

These same constitutional implications have been recognized by federal courts in other forfeiture cases. In, for example, *U.S. v. Premises Known As 608 Taylor Ave.*, 584 F.2d 1297 (3d Cir. 1978), the court held forfeitures of contraband must be afforded due process protection. Such forfeitures must be done within a reasonable time, for "if reasonable time limitations are not placed upon the application of . . . [the applicable forfeiture statutes], a question of the constitutionality of the statutes could be raised." *U.S. v. One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977); and, in accord, *Sarkisian v. U.S.*, 472 F.2d 468 (10th Cir. 1973).

The basis of these courts' recognition of the constitutional ramifications surrounding such forfeitures is the same as that underlying California Penal Code Section 1305, as discussed above. Due process demands, whether contraband or bonds are forfeited, that there be "some form of notice and a hearing." *Isbell v. County of Sonoma, supra*, 68.

Other constitutional issues are present here—whether "timely surrender" under Federal Rule of Criminal Procedure 46 is unconstitutionally vague; and whether requiring sureties to "irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served," as prescribed by Federal Rule of Criminal

Procedure 46(e)(3), violates due process guarantees.

These issues have never been decided by the United States Supreme Court; a decision is needed now. Until this Court settles these issues, constitutional rights afforded sureties will remain in jeopardy.

B. THIS CONFLICT CAUSES CONFUSION AND UNCERTAINTY.

These issues are decided inconsistently from one circuit to another. Thus, because of this conflict of law, sureties face uncertainty and confusion when entering into bail bond contracts. Sureties do not know whether state or federal law applies in construing these contracts, or whether their constitutional rights are being waived. Sureties are unsure if bonds are to be forfeited without notice, or forfeited after a reasonable time or when else they are to be forfeited.

The uncertainty and confusion caused by this conflict will remain until this Court settles these issues. Until this conflict is resolved, federal trial and appellate courts will continue to spend valuable time applying inconsistent legal principles and circumscribing constitutional rights.

CONCLUSION

For the above reasons, petitioner respectfully prays this Court to issue a Writ of Certiorari to review the judgment and opinion of the court below so that the conflict surrounding these cases may be settled.

Dated: August 20, 1982

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